

COUNCIL DOCKET OF \_\_\_\_\_

☐ Supplemental   ☐ Adoption   ☐ Consent   ☐ Unanimous Consent   Rules Committee Consultant Review

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Deputy City Attorneys Association Civil Service Classification Proposal

☒ Reviewed   ☐ Initiated   By Rules   On 6/25/08   Item No. 3c

## RECOMMENDATION TO:

No action taken. Members of the Rules Committee asked that the Mayor and the City Attorney Meet and Confer on the issue.

VOTED YEA: N/A

VOTED NAY:

NOT PRESENT:

CITY CLERK: Please reference the following reports on the City Council Docket:

REPORT TO THE CITY COUNCIL NO.

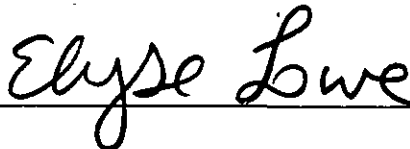
INDEPENDENT BUDGET ANALYST NO.

COUNCIL COMMITTEE CONSULTANT ANALYSIS NO.

OTHER:

Deputy City Attorneys Association of San Diego's June 19, 2008, memorandum; City Attorney's June 24, 2008, memorandum

COUNCIL COMMITTEE CONSULTANT

Handwritten signature of Elyse Lowe in black ink.

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RULES 6/25/08 #30

Office of  
The City Attorney  
City of San Diego

MEMORANDUM  
MS 59

(619) 236-6220

**DATE:** June 24, 2008  
**TO:** Honorable Mayor and City Council  
**FROM:** City Attorney  
**SUBJECT:** Deputy City Attorneys Association Ballot Proposal to Amend Charter Sections 40 and 117

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On Friday, June 20, 2008 the Deputy City Attorneys Association [DCAA] submitted a ballot proposal to the City Clerk to amend Charter Sections 40 and 117 to provide Civil Service protection for Deputy City Attorneys.

Charter Section 40 provides, in part:

The City Attorney shall appoint such deputies, assistants, and employees to serve him or her, as may be provided by ordinance of the Council, but all appointments of subordinates other than deputies and assistants shall be subject to the Civil Service provisions of this Charter.

The ballot proposal includes the addition of the following language:

Before January 31, 2010, the Civil Service Commission shall present to the City Council for approval a new classification system for Deputy City Attorneys. In developing the new classification and salary system, the Civil Service Commission shall consider other classified systems for public attorneys in other counties or municipalities and input from any labor organization representing the Deputy City Attorneys. Effective July 1, 2010, all full-time or part-time Deputy City Attorneys in unclassified service, with more than one year of continuous service as Deputy City Attorneys prior to and through that

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date, shall have their unclassified appointments converted to permanent equivalent appointments for which they qualify as Deputy City Attorneys in the classified service, with seniority computed according to the date of most recent continuous employment with the City.

Charter Section 117 relates to unclassified and classified service and provides:

Employment in the City shall be divided into the  
Unclassified and Classified Service.

(a) The Unclassified Service shall include:

(10) All Assistant and Deputy City Attorneys.

The DCAA proposes removing "All Assistant and Deputy City Attorneys" and replacing with "Effective July 1, 2010, six assistant attorneys and two other assistants to the City Attorney."

The DCAA's proposal is not consistent with the Grand Jury recommendations. Further, the ballot proposal, as written, is ill-defined and requires more comprehensive legal analysis. The ballot proposal was not raised during the recent labor negotiation process and was submitted without the City Attorney's involvement. Ultimately, as explained below, providing civil service protection to the Deputy City Attorneys is contrary to the public interest.

I. Many concerns have been raised about civil service protection for employees.

California Civil Service protection was created in November 1934 when voters added what is now Article VII to the State Constitution. Since that time, a multitude of statutes, rules and practices have built around the Constitutional framework. However, Civil Service has been criticized for its departure from the system's original merit principles, preoccupation with process over results and for creating barriers to personal and career development of employees.<sup>1</sup>

The State Legislative Analyst Office studied the origins, purpose, and resulting consequences of civil service protection and found:

The core foundation of the civil service is the merit principle—that people should attain appointment and promotions in state service on the basis of qualifications and merit in performance. In several significant respects we find that laws, rules and practices which have been

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<sup>1</sup> California Legislative Analyst's Office, *Reinventing the State Civil Service*, February 22, 1995, p. 1

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added since the system's inception have departed from this core principle.<sup>2</sup>

The Commission on California State Government Organization and Economy was created to study reforming California's problem-ridden Civil Service. The Commission found that the values that inspired civil service protections had long since been undermined by over regulation:

America's civil service was invented 100 years ago to guarantee merit in the hiring process. Sadly, many state and local governments have created such rule-bound and complicated systems that merit is often the last value served. How can merit be served, for example, when supervisors are only allowed three choices from among hundreds of possible candidates for a job? How can merit be served when pay is determined mainly on the basis of time on the job? How is merit served when top performers can be "bumped" from their jobs by poor performers during downsizings?<sup>3</sup>

The Commission's study resulted in recommendations including a stream-lined personnel management system delegating the authority to hire, promote and reward employees directly to departments.<sup>4</sup> The Committee sought to abolish what the DCAA is now seeking to create.

The efficiency and value of an operation such as the City Attorney's Office depends upon its ability to recruit the best possible personnel. Civil Service protection limits flexibility in hiring which is onerous and time-consuming. There are times when an attorney is needed immediately and it would take months to fill a vacancy. It would also limit the ability to move attorneys between positions in order to cover for vacations, maternity leave, and extended absences.

Additionally, Civil Service regulations make it very difficult to terminate incompetent employees. Moreover, exemplary employees are paid the same as, or less than, mediocre employees. The combination of low government pay and civil service protection would attract less competent attorneys to the City Attorney's Office.

As salaried employees, deputy city attorneys regularly work overtime as an essential job function. This proposal would require overtime pay and seriously compromise the City Attorney's ability to manage the department budget.

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<sup>2</sup> California Legislative Analyst's Office, *Reinventing the State Civil Service*, February 22, 1995, p. 5

<sup>3</sup> State of California, Little Hoover Commission, *Too Many Agencies, Too Many Rules: Reforming California's Civil Service*, May 4, 1995, p. 2

<sup>4</sup> Katherine C. Naff, *Prospects for Civil Service Reform in California*, San Francisco State University, p. 7

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II. There are a number of civil service models.

This proposal does not describe the civil service model that would be adapted to the City Attorney's Office.

In order to effectively adopt an appropriate model, each would require extensive individual study and analysis to determine their applicability.

Importantly, there has not been any study to determine the budget impacts, the service level impacts, the performance standards, or the application to the criminal and civil divisions.

III. This proposal would impose restrictions not permitted by State law that would prevent the Office of the City Attorney from carrying out the duties expected under the City Charter, and by the City Council and the people of San Diego.

The DCAA proposal imposes numerous mandatory requirements on the employer that take away management rights of the City guaranteed by state law. If approved, the restrictions in the proposal will prevent the effective operation of the City Attorney's Office. These proposals include: (a) dictating with specific numbers how much managerial staff the City Attorney is permitted to have to operate the office; (b) mandating the creation of a new classification for Deputy City Attorneys, with a new salary schedule and new job duties, overriding state law that provides that it is the employer, not the union that decides when and if to create a new classification and the job duties of the position; (c) imposing a mandatory seniority system and in addition, one based on total City employment as opposed to experience and area expertise as an attorney. In addition, it appears these proposals would interfere with the independence of the Office of the City Attorney as provided for in the City Charter, and will prevent the Office from fulfilling the mandates of the Office required by law and the People of the City of San Diego.

A. Determination of Classification as Management or Confidential Employee, Work Load, Staffing Levels, and Assignment of Work.

State law and the Public Employment Relations Board [PERB] recognize that the direction of the work force and determination of what work is to be performed by employees is a managerial prerogative, at the core of managerial control, and not subject to bargaining. *Davis Joint Unified School District*, PERB Decision No. 393 (1984). The duty to meet and confer in good faith is limited to matters within the "scope of representation". Government Code section 3505. Section 3504 specifically excludes from the scope of representation "consideration of the *merits, necessity, or organization* of any service or activity provided by law or executive order." California Government Code section 3504, emphasis added.

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Even if an employer's action or policy has a significant and adverse effect on the bargaining unit's wages, hours, and working conditions, the employer may be excepted from bargaining requirement under the "merits, necessity, or organization" language of section 3504. This exclusionary language which was added in 1968, was intended to "forestall any expansion of the language of 'wages, hours and working conditions' to include more general managerial policy decisions. Federal and California decisions both recognize the right of employers to make unconstrained decisions when fundamental management or policy choices are involved. To require public officials to meet and confer with their employees regarding fundamental policy decisions such as those here presented, would place an intolerable burden upon fair and efficient administration of state and local government. *Claremont Police Officers Association v. City of Claremont*, 39 Cal.4<sup>th</sup> 623, 631-632, (2006), (internal citations omitted.)

The DCAA proposal would void state law regarding management rights in the areas of determining the classification of employees as management or confidential, the work load to assign attorneys, the staffing levels of the City Attorney's office, and the work assigned to attorneys.

B. Staffing levels and work assignments.

The DCAA proposal restricts the number of confidential and management employees of the City Attorney's office to six assistant attorneys and two other assistants.<sup>5</sup> The proposal requires all additional staff must be made classified employees, not exempt due to being in management or handling confidential information.

Staffing levels and work assignments are held to be a matter of management prerogative, as they reflect managerial decisions regarding the level of services to be provided by the public agency. *Fire Fighters Union v. City of Vallejo*, 12 Cal.3d 608 (1974); *State of California (Department of Corrections)* PERB Decision No. 1848-S (2006); *State of California (Department of Corrections)* PERB Decision No. 1381 (2000); *Mount Diablo Unified School District* PERB Decision No. 373 (1983).

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<sup>5</sup> It is unclear what the definition of "assistants" is in regard to the language permitting only "two other assistants" as excluded employees from Civil Service.

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Staffing levels of managers is outside the scope of what a union can demand of management. *Firefighters Union, Local 1186, LAFF, AFL-CIO v. City of Vallejo*, 12 Cal.3d 608 (1974). It is a management right to appoint the number of management and confidential employees the employer deems necessary to carry on the business of the office. This can not be restricted. The DCAA proposal would obviate state law and the City's ability to decide the number of managers and confidential employees it needs.

In addition, by imposing an absolute limit on the number of management and confidential employees of the Office, the proposal also usurps the right of the employer, in conjunction with the Civil Service Commission, to make decisions as to whether particular employees are management, confidential, supervisorial, or classified. The Meyers-Milius-Brown Act authorizes cities to adopt procedures for determining which of its employees will be designated confidential or managerial. Government Code section 3507.5. Under the specific definitions of each of these categories, employees are categorized by the City, in conjunction with the Civil Service Commission, based upon the duties of the position. A designation of "management" status by the agency will uphold if it is reasonable, based upon consideration of the job duties and responsibilities. *United Clerical Employees v. County of Contra Costa*, 76 Cal.App.3d 119 (1977). Because the DCAA proposal has an absolute limit in the number of non-classified positions that can exist, the proposal would remove the City's and Civil Service Commission authority to make those decisions based upon the individual duties and responsibilities of the classification. This is contrary to State and City law and the authority of the City and Commission to make those decisions.

Conversely, because the DCAA proposal requires that all staff of the Office must be classified employees, other than six assistant attorneys and two other assistants, the proposal imposes an impermissible staffing level decision of the number of non-management positions of the Office. Imposing any staffing levels on the City Attorney, whether it be the number of management and confidential employees the Department can have, or the number of non-managerial and non-confidential employees the Department must have, is an illegal staffing requirement, contravening the employer's right to decide these issues.

C. Classification and re-classification of positions and setting of new salaries.

The DCAA proposal requires the Civil Service Commission to develop a new classification system and a new salary system for Deputy City Attorneys and requires the Commission to present the new classification and salary systems to the City Council for a vote. This would abrogate the power of the Civil Service Commission in conjunction with the City, to determine whether to create a classification. See Civil Service Rules, Introduction and Rule 1.

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The decision to create or abolish a job classification can not be mandated by DCAA. It is not negotiable because management has an overriding interest in determining both the functions necessary to accomplish its mission and those that no longer service its purpose. *Lake Elsinore School District*, PERB Decision No. 646 (1987). Only if the employer decides to create a new classification is salary a matter to be negotiated. The DCAA proposal would require that new classifications be created as well as new salary systems for those classifications. This is contrary to the law which leaves the decision whether to create new positions to management. There is only an obligation to create a salary schedule for the new position if management decides to create a new classification.

The law provides management the right to determine the classifications needed and the job duties of the classification, because it is management which determines how to deliver the City's services. The DCAA proposal is an impermissible intrusion on the employer's right to decide if and when to create or change classifications and the job duties of those classifications.

D. Imposing a mandatory seniority system and one that credits total City years of work, rather than experience as an attorney or in a specific legal field.

The DCAA proposal imposes a mandatory seniority system based upon continuous employment with the City. However, under state law, whether or not there is a seniority system at all, and if so, what shall be used to calculate seniority in a particular class or subclass, is a mandatory subject of bargaining that can not be imposed unilaterally as DCAA's proposal does. *San Mateo City School District*, PERB Decision No. 375 (1984); *Mt. Diablo Unified School District*, PERB Decision No. 373 (1983).

DCAA imposes more than just a seniority system. It requires it count for seniority total City service, rather than continuous employment as a Deputy City Attorney. Again, the use and computation of seniority time is a negotiable item. Here, the DCAA impermissibly attempts to circumvent state labor law and mandate the result.

In addition, time in other positions is irrelevant to salary increases, promotions, transfers, reassignments and merit increases as a Deputy City Attorney. (Often agreements provide for seniority as a priority in selection in the circumstances listed in the prior sentence.) Allowing seniority to go back to first date hired by City would mean that salary levels and other employment benefits might be based, in part, on time in other jobs.

Experience as a Deputy City Attorney should be the consideration for personnel actions, not time in other positions. Even time as a Deputy City Attorney is irrelevant to experience in a given field. An attorney with fifteen years criminal experience will not be as qualified for a position as in City contracts as an attorney working in that division for five years.



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The proposal also impermissibly requires part-time Deputy City attorneys, irrespective of limited number of hours worked, to be converted to permanent equivalent appointments in the classified service, again taking away the City's right to negotiate something different.

E. Attempt to Avoid State and City Law Regarding the Union's Duty to Negotiate.

Each of the areas dictated by the proposal (i.e. staffing levels, seniority, creation of new classifications, determining the salaries and job duties of those new positions), the proposal fail to comply, and attempts to avoid, the requirements of California law and City Council policy that the City Attorney, the Mayor, and the union meet and confer and come to an agreement, or if not, that the matter go through the City impasse procedures.

F. Loss of Management Effectiveness of Attorneys.

Beyond the attempt of the proposal to circumvent State and City law as to management rights and the right to negotiate, placing attorneys under a Civil Service System will limit the flexibility of a City Attorney to carry out the mandates of the office. The Civil Service Commission develops and administers policies governing the classification, recruitment, selection, promotion, and removal of Classified employees of the City. This will alter the decision making process as to selection, promotion, and dismissal of city attorneys. These decisions will be taken away from the Office of City Attorney. It may make it difficult to remove incompetent employees, and fosters a workforce based on seniority rather than merit. The DCAA proposal removes decision making for running a competent office from the Office of the City Attorney. The Council should question whether this is a desirable goal for the City.

IV. The Deputy City Attorneys Association did not make this proposal during labor negotiations.

During labor negotiations, DCAA proposed that no employee be removed without good cause, who has served continuously as an attorney in the Office of the City Attorney for two years or more immediately preceding the removal. By proposing a two year exception to the good cause provision, it can be implied that even the DCAA acknowledges the merit of having the flexibility to terminate employees, in order to initially adequately evaluate the attorney's skills, abilities and "fit" within the Office. However, the DCAA never proposed a new classification and salary system be presented to the City Council for approval by the Civil Service Commission. The DCAA is now attempting to circumvent the meet and confer process to bring before the voters a ballot measure to amend the City Charter which should have been presented during the meet and confer process.

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- V. Suggested amended ballot proposal provides for input from the DCAA, contrary to other protected classifications in the City.

Requiring consideration of input "from any labor organization representing Deputy City Attorneys" will prejudice the process. Also lacking is the fact the measure does not require the Commission to consider input on behalf any City employee that wishes to contribute to the consideration, only unions.

- VI. This proposal is requires more comprehensive legal analysis. The City Attorney has not been involved in writing or developing this proposal.

Some of the issues and requisite information needed to thoroughly assess and analyze the DCAA proposal include the following:

1. Does the DCAA have any research on civil service reform as applied in other jurisdictions?
2. Does the DCAA have any information regarding putting current attorneys through the civil service process to determine if they are qualified for current positions?
3. Does the DCAA have any information regarding putting a group of attorneys already hired into the civil service process after already hired and performing the job?
4. Does the DCAA have any research to demonstrate that providing civil service protection to deputy city attorneys is better for the taxpayers than not providing civil service protection?
5. How did the DCAA arrive at this proposal, such as the number of assistants?
6. What is the proposed classification system for deputy city attorneys?
7. Has civil service protection for deputy city attorneys been presented to a prior City Attorney?
8. Does the DCAA have any examples in the last 10 years of situations where attorneys at-will converted to civil service in another jurisdiction?
9. Has the DCAA looked at performance based pay?
10. Has the DCAA looked into application of a civil service system comparable to the federal civil service system?

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11. The Civil Service Commission is appointed by the Mayor. Has the DCAA considered including Mayoral and City Council staff in the civil service?
12. Under the DCAA proposal, would attorneys working on the pension board be subject to the civil service?

VII. Civil Service Protection for Deputy City Attorneys is contrary to the public interest.

Civil Service protection results in form over substance decision making, creates unnecessary bureaucracy, and ensures protection for mediocre performers. The emphasis is on job security, not on public service. The Civil Service Commission is not designed to select attorneys that are committed to public service.

MICHAEL J. AGUIRRE, City Attorney

By



Michael J. Aguirre  
City Attorney

MJA:d

cc: Scott Chadwick, Labor Relations  
Andrea Tevlin, Independent Budget Analyst  
Elizabeth Maland, City Clerk

DEPUTY CITY ATTORNEYS ASSOCIATION  
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DEPUTY CITY ATTORNEYS  
ASSOCIATION OF SAN DIEGO

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SAN DIEGO, CALIF.

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MEMORANDUM

**DATE:** June 19, 2008

**TO:** The San Diego City Clerk

**FROM:** The Deputy City Attorneys Association of San Diego

**SUBJECT:** Proposed Measure to Amend City Charter Sections 40 and 117 to Provide Deputy City Attorneys with Civil Service Protection: For Consideration by the Rules, Open Government and Intergovernmental Relations Committee

On June 4, 2008, the San Diego County Grand Jury issued a report [GJ Report] suggesting in part that the City of San Diego consider moving San Diego Deputy City Attorneys from the City's Unclassified Service to the Classified Civil Service, in order to provide greater stability in the City Attorney's Office. GJ Report, p. 7. See attached. The County Grand Jury found that there has been substantial turnover within the City Attorney's Office within the last three years, which has negatively impacted conduct of the City's business. It determined the negative impact was due to a loss of institutional knowledge and the steep learning curve required of new city attorneys to master the many complex issues San Diego City Departments and agencies face. GJ Report, pp. 5-6.

The Grand Jury notes that Deputy City Attorneys are all unclassified City employees and subject to dismissal at the will of the City Attorney. By contrast, other local public law offices that perform similar civil and criminal prosecution functions for the County of San Diego, such as the San Diego County Counsel's Office and the San Diego District Attorney's Office, provide Civil Service protection to nearly all of their deputy attorneys. In order to provide similar job stability the grand jury suggests investigating a similar protection for Deputy City Attorneys.

Accordingly, we present the City Clerk with a ~~strikeout~~ version of a measure for consideration by the City Council Rules, Open Government and Intergovernmental Relations Committee for recommendation and referral to the City Council for placement on the November 2008 ballot. The measure would amend San Diego Charter sections 40 and 117 to require all Deputy City Attorneys appointed on or after July 1, 2010, to be members of the City's classified service.

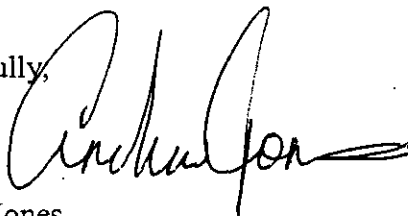
The suggested amendments provide a delay in operation to permit the Civil Service Commission to draft and present to the City Council a new classification system for Deputy City Attorneys by January 31, 2010. The amendments require the Civil Service Commission to consider classified systems for public attorneys in other counties or municipalities and suggestions from the labor organization representing the Deputy City Attorneys in developing the classification system. The measure contemplates that all unclassified Deputy City Attorneys with one or more years of prior unclassified continuous service shall have their unclassified appointments converted to a permanent classified appointment for which they qualify on July 1, 2010.

The Association understands the desire of an elected official to have a senior management team of his or her own choosing. Historically, six assistant attorneys have served in senior management positions within the Office. Therefore, the proposed amendment allows the City Attorney to appoint six attorney assistants and two other assistants who will retain unclassified status and will continue to serve at the pleasure of the elected City Attorney.

The City Council is aware that this Association has repeatedly requested the City provide employment protection for the Deputy City Attorneys who work so diligently to provide necessary services to the City and its departments, and to the People of California by prosecuting misdemeanor offenses occurring in San Diego. We are appreciative of the Grand Jury's report. We urge the Council to act now to present voters with a measure that will provide all Deputy City Attorneys the same civil service protections provided other public attorneys in San Diego County. The process should provide the City of San Diego with a stable, professional and experienced group of attorneys who will provide timely advice to the City and its departments, defend the City in litigation, initiate City lawsuits, and prosecute criminal acts occurring within the City of San Diego.

The Deputy City Attorneys Association of San Diego requests the Clerk to forward this memorandum, proposed measure and attachment to the Rules Committee for consideration at its June 25, 2008, meeting. Further, the Association respectfully requests that the Committee recommend the City Council place the matter on the November 2008 ballot for voter consideration.

Respectfully,

A handwritten signature in black ink, appearing to read "Andrew Jones", with a stylized flourish at the end.

Andrew Jones  
President,  
Deputy City Attorneys Association of San Diego

**Proposed Measure to Amend Charter sections 40 and 117.**  
**New phrases indicated by underline, deleted phrases by strikeout.**

**Section 40: City Attorney**

At the municipal primary and general election in 1977, a City Attorney shall be elected by the people for a term of seven (7) years. A City Attorney shall thereafter be elected for a term of four (4) years in the manner prescribed by Section 10 of this Charter.

Notwithstanding any other provision of this Charter and commencing with elections held in 1992, no person shall serve more than two (2) consecutive four-year terms as City Attorney. If for any reason a person serves a partial term as City Attorney in excess of two (2) years, that partial term shall be considered a full term for purposes of this term limit provision. Persons holding the office of City Attorney prior to the November 1992 election shall not have prior or current terms be counted for the purpose of applying this term limit provision to future elections.

The City Attorney shall be the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties, except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney. The attorney and his or her deputies shall devote their full time to the duties of the office and shall not engage in private legal practice during the term for which they are employed by the City, except to carry to a conclusion any matters for which they have been retained prior to taking office.

The City Attorney shall appoint such deputies, assistants, and employees to serve him or her, as may be provided by ordinance of the Council, but effective July 1, 2010, all appointments of subordinates other than ~~deputies~~ six assistant attorneys and two other assistants shall be subject to the Civil Service provisions of this Charter. Before January 31, 2010, the Civil Service Commission shall present to the City Council for approval a new classification system for Deputy City Attorneys. In developing the new classification and salary system, the Civil Service Commission shall consider other classified systems for public attorneys in other counties or municipalities and input from any labor organization representing the Deputy City Attorneys. Effective July 1, 2010, all full-time or part-time Deputy City Attorneys in unclassified service, with more than one year of continuous service as Deputy City Attorneys prior to and through that date, shall have their unclassified appointments converted to permanent equivalent appointments for which they qualify as Deputy City Attorneys in the classified service, with seniority computed according to the date of most recent continuous employment with the City.

It shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, to perform all services incident to the legal department; to give advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department, but all such advice shall be in writing with the citation of authorities in support of the conclusions expressed in said written opinions;

to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law; to prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned, and to endorse on each approval of the form or correctness thereof; to preserve in the City Attorney's office a docket of all cases in which the City is interested in any of the courts and keep a record of all proceedings of said cases; to preserve in the City Attorney's office copies of all written opinions he or she has furnished to the Council, Manager, Commission, or any officer. Such docket, copies and papers shall be the property of the City, and the City Attorney shall, on retiring from office, deliver the same, together with all books, accounts, vouchers, and necessary information, to his or her successor in office.

The City Attorney shall have charge and custody of all legal papers, books, and dockets belonging to the City pertaining to his office, and, upon a receipt therefor, may demand and receive from any officer of the City any book, paper, documents, or evidence necessary to be used in any suit, or required for the purpose of the office.

The City Attorney shall apply, upon order of the Council, in the name of the City, to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the City or the abuse of corporate powers, or the execution or performance of any contract made in behalf of the City which may be in contravention of the law or ordinances governing it, or which was procured by fraud or corruption. The City Attorney shall apply, upon order of the Council, to a court of competent jurisdiction for a writ of mandamus to compel the performance of duties of any officer or commission which fails to perform any duty expressly enjoined by law or ordinance.

The City Attorney shall perform such other duties of a legal nature as the Council may by ordinance require or as are provided by the Constitution and general laws of the State. The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith. The Council shall provide sufficient funds in the annual appropriation ordinance for such purposes and shall charge such additional legal service against the appropriation of the respective Departments.

The salary of the City Attorney shall be fixed by the Council and set forth in the annual appropriation ordinance, provided that the salary of the City Attorney may not be decreased during a term of office, but in no event shall said salary be less than \$15,000.00 per year.

In the event of a vacancy occurring in the office of the City Attorney by reason of any cause, the Council shall have authority to fill such vacancy, which said authority shall be exercised within thirty (30) days after the vacancy occurs. Any person appointed to fill



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such vacancy shall hold office until the next regular municipal election, at which time a person shall be elected to serve the unexpired term. Said appointee shall remain in office until a successor is elected and qualified.

**Section 117. Unclassified and Classified Services**

Employment in the City shall be divided into the Unclassified and Classified Service.

(a) The Unclassified Service shall include:

[subsections (1) through (9) no change in text]

(10) ~~All Assistant and Deputy City Attorneys.~~ Effective July 1, 2010, six assistant attorneys and two other assistants to the City Attorney.

[subsections (11) through (17) no changes to text]

[subsections (b) and (c) no change in text]

## ***SAN DIEGO CITY ATTORNEY'S OFFICE***

### ***SUMMARY***

The past few years have been trying times for America's Finest City. Against the backdrop of a statewide budget crisis and a major decline in real estate values, terms like Pension Scandal, Bond Market, Kroll Report, Navy Broadway Complex, Corruption Trial, and Sunroad have become all too familiar. Add a major landslide and two series of "One Hundred Year" wildfires in four years into the mix, and we are reminded of the ancient Chinese curse: "May you live in interesting times." In January 2006, after seventy-three years of a City Council-City Manager form of governance, Proposition F, passed by the electorate in November 2004, retired the City Manager's office and embarked the San Diego on a five-year experiment with a Strong Mayor-Council form of governance. A little over two years into this five-year trial period, the Mayor (acting as the "elected City Manager") and the City Council have had plenty to keep them busy. The people of the City of San Diego have asked tough questions about how well they are being served by this new form of governance.

Under the San Diego City Charter, only two officials are elected "at large" by all the voters: the Mayor and the City Attorney. With the Mayor's Office already under close scrutiny by the community because of the "strong mayor" trial period, the 2007/2008 San Diego County Grand Jury (hereinafter, "Grand Jury") acting on a complaint, studied the regulations governing the office of City Attorney. San Diego is one of less than a dozen California cities where the City Attorney is directly elected rather than appointed. The City Charter is not clear on the interpretation of the City Attorney being "an independent representative of the people." This has contributed greatly to the "interesting times" mentioned above. The city's electorate will shortly decide whether they agree with the independent representative concept, and it is not the province of a county grand jury to join in that debate. We used the authority granted us in the California Government and Penal Codes to examine those parts of the city charter that made the *status quo* possible.

### ***PURPOSE***

- To examine whether the role of the City Attorney, as defined in the San Diego City Charter, serves the public in the 21<sup>st</sup> century as well as it did when the charter was adopted seventy-seven years ago.
- To examine whether some of the approximately 135 Deputy City Attorneys should be changed to Classified Civil Service positions.

### ***PROCEDURES***

The Grand Jury interviewed recognized experts with cumulative experience of nearly a century in the field of municipal law. These included former city attorneys, both elected and appointed, from several California municipalities.

We reviewed legal opinions and texts from various sources that have been cited as authoritative on the role of a city attorney in a Municipal Corporation. These included a report by the incumbent San Diego City Attorney on the Role Of The City Attorney As Independent Representative of The People And City Of San Diego, available on the city website at <http://www.sandiego.gov/cityattorney/pdf/role050426.pdf>. This report provided us a valuable perspective on the events and public discourse leading to adoption of the 1931 San Diego City Charter.

We reviewed the final report of the 2007 City of San Diego Charter Review Committee (available on the city website at <http://www.sandiego.gov/charterreview/index.shtml>) and interviewed members of that committee.

We interviewed officials from various San Diego city departments including:

- the Mayor's Office.
- several city departments and agencies that report to the Mayor
- Councilmembers' staffs
- the City Attorney's Office
- the Personnel Director's Office
- the Civil Service Commission

We reviewed the charters of two other large California cities that elect, rather than appoint, their city attorney: the 1997 Charter of the City of Los Angeles and the 1995 Charter of the City and County of San Francisco.

We interviewed attorneys from the offices of the San Diego County District Attorney and the County Counsel. These government offices also employ large numbers of attorneys who serve in roles similar to that of an associate in a private-sector law firm.

### ***DISCUSSION #1 The Office of City Attorney***

The 1931 San Diego City Charter defines the primary duties and responsibilities of the City Attorney in Article V, §§ 40 and 40.1. (See Appendix A)

In General Law cities as well as in most Charter cities, the position of City Attorney is filled by appointment rather than direct election by the people. In some cases an appointed City Attorney is hired as a municipal employee; in others the city retains a law firm to handle the city's business on an as-needed basis. There are law firms in California that specialize in providing these services to a number of (mostly smaller) municipal clients.

The pros and cons of an elected rather than appointed city attorney are multifaceted, and were being debated in at least one other San Diego County municipality as this report was being written.

A major argument in favor is that an elected city attorney is accountable directly to the people and can represent their best interests, while an appointed one serves at the

pleasure of the current administration, and can be summarily dismissed for rendering an opinion the administration doesn't like. A corollary is that the city administration could theoretically shop around for an attorney who will provide the legal advice it wants to hear. This appears to have been a major point in the discussions leading to adoption of the San Diego City Charter in April 1931.

A counter-argument is that anyone functioning as a city attorney (i.e., the "chief legal adviser of, and attorney for the City and all Departments and offices thereof...") is bound by the California Bar Association's Code of Professional Responsibility to represent his or her client according to their wishes (within the law). In a city of 1.7 million people, who is the client? How do the people individually and collectively make their wishes known? What does the city attorney do when he or she has a conflict with the State Bar's Code of Professional Responsibility? The San Diego City Charter doesn't say. There are indications in the historical record that the Board of Freeholders in 1931 intended that the City Attorney would act as a sort of independent counterbalance to the elected City Council (which included the Mayor) and the appointed City Manager. How he or she is to accomplish this within the law and the Code of Professional Responsibility was left undefined, and remains so to this day.

Merriam-Webster's dictionary defines **Body Politic** as "a group of persons politically organized under a single governmental authority." In our investigation we heard hours of testimony and reviewed numerous legal opinions that were nearly unanimous on the role of a city attorney in the modern Municipal Corporation: This was that he body politic expresses its will through the elected representatives (in this case the Mayor and City Councilmembers), and the City Attorney's "civil client" is defined by that relationship.

Under this interpretation, it is the City Attorney's responsibility:

- to advise the elected representatives, and the city's subordinate departments and agencies, on the legal ramifications of city business,
- to defend the actions of the Municipal Corporation in court when necessary,
- to afford city officials attorney-client confidentiality (except as modified by California Government Code §54950.5 – the Ralph M. Brown Act), and
- to perform such other duties as the City Charter or the Council may direct. This last point may include such matters as initiating lawsuits and prosecuting misdemeanor offenses.

In its final report, the 2007 City of San Diego Charter Review Committee (see Appendix B) expressed strong concern over the current job description of the City Attorney: "One of the most serious problems with the Charter is the ambiguity of §40. The City has witnessed constant conflict over defining the duties of the City Attorney's Office

The Charter Review Committee noted that §40 does not require that the City Attorney actually be an attorney. This may seem self-evident; it's hard to imagine a successful candidate for City Attorney (elected *or* appointed) who isn't licensed to practice law in California. On the other hand, the 1997 Los Angeles City Charter, §270, does begin with the words: "The City Attorney must be qualified to practice in all the courts of the state."

The City of San Diego Charter Review Committee recommended amending §40 to include similar language.

The Charter Review Committee was also concerned that §40 doesn't presently define who the client is. "The problem with the claim that the City Attorney is to represent the general public is that the people do not speak with one voice. How does one know what the public wants in any given situation? Consequently, an attorney who sees him or herself in this manner acts as both the attorney and the client." We learned in our investigation that §40 of the charter as currently worded can create an ethical dilemma for even the most dedicated attorney who might be trying to redress past wrongs in the city's business. The Charter Review Committee recommended amending §40 to define the Civil Client as the municipal corporation of the City of San Diego, and to clarify authority over the control and settlement of litigation by the city. The Grand Jury found the committee's concerns to be justified.

The Grand Jury acknowledges the efforts of the Board of Freeholders and the community in enacting the 1931 charter. We also recognize the efforts and accomplishments of the dedicated individuals who have served as San Diego City Attorney during the past seven decades. We give due weight to historical precedent. However, we feel on balance that the existing job description of the City Attorney is inadequate in the 21<sup>st</sup> Century field of municipal law.

### ***FACTS/FINDINGS***

***Fact:*** Article V, §40 of the San Diego City Charter was enacted in April 1931 as part of a Progressive Reform movement in the city. It does not require that the City Attorney actually be an attorney, nor does it specify who the Civil Client is.

***Finding #01*** Article V, §40 of the San Diego City Charter no longer reflects the generally held viewpoint concerning the role an elected City Attorney should play as general counsel of a modern Municipal Corporation and should be amended.

### ***RECOMMENDATION***

The 2007/2008 San Diego County Grand Jury recommends that the Mayor and City Council of the City of San Diego:

**08-122:** Draft an amendment to Article V, §40 of the San Diego City Charter, specifying more clearly the qualifications, duties and responsibilities of the City Attorney, and submit it to the electorate at an appropriate future date.

***DISCUSSION #2 Employment Status of Deputy City Attorneys***

[NOTE: The term "Unclassified Civil Service," as used in this report, signifies a San Diego city employee whose employment may be terminated at any time, consistent with Article VIII of the city charter, according to the rules of his or her office or department, and consistent with any collective bargaining agreement in which he or she may be enrolled. This contrasts with the traditional, or "Classified Civil Service," in which a final decision on termination is referred to a Civil Service Commission, and which includes an appeals process.]

When the current San Diego City Charter was adopted in 1931, the City Attorney's Office employed approximately 5 Deputy City Attorneys to assist the newly elected City Attorney in his task of advising the Municipal Corporation on the legal ramifications of conducting its business. The deputies were hired as "unclassified" city employees who served at the pleasure of the City Attorney. This is not unusual and is similar to the status of associate attorneys at law firms in the private sector, who typically serve at the pleasure of the firm's management. In 2008, the San Diego City Attorney's Office employs approximately 135 Deputy City Attorneys, all of whom, according to Article VIII, Section 117, Subsection (a)(10) of the San Diego City Charter, are in the Unclassified Civil Service. During our investigation of the issues raised in Discussion #1 above, the Grand Jury learned some facts that made us take a deeper look into the employment status of Deputy City Attorneys.

A few years ago the Deputy City Attorneys for the first time formed a bargaining unit, and negotiated a Memorandum of Agreement (MOA) with the city that provides them with some minimal protections in case of a termination of employment. We were surprised to find that the equivalent rank and file attorneys at the offices of the District Attorney and the County Counsel have had collective bargaining agreements for a much longer period, and have significantly more protections than the Deputy City Attorneys. We learned that in some cases Deputy City Attorneys had left the office of the City Attorney and joined the offices of the District Attorney or the County Counsel, looking (at least in part) for better job security. We investigated what effect a high turnover at the office of the City Attorney might be having on the city's corporate knowledge base.

Deputy City Attorneys frequently advise other city officials and employees on the legal ramifications of issues (e.g., building permits) in their departments' areas of responsibility. The legal history of the municipal corporation's business dealings is one of the foundation stones the city is built on. The impact a significant loss of corporate knowledge has in a law firm is difficult to measure. However, a large-scale disruption in the flow of the minute details that make up the legal brief in support of a complex piece of city business (e.g., a redevelopment project), could result in a major loss to the city in the courtroom.

As stated above, the San Diego City Attorney's office currently employs approximately 135 Deputy City Attorneys, supervised by an appropriate number of division heads and other senior staff. We learned from the office of the City Personnel Director that over a

recent period of approximately three years, the City of San Diego hired 140 Deputy City Attorneys, while a total of 124 were separated by termination, resignation and retirement from the city's employ. The latter total does not include promotions or lateral transfers.

The Grand Jury recognizes that human resources issues are complex and the impact of personnel turnover in a large organization cannot be analyzed by simple arithmetic. This is especially true of licensed professionals such as attorneys. People change jobs for many reasons, as is their right. However, we learned from officials and employees in a number of city departments that the turnover of Deputy City Attorneys approximating one hundred percent in a little over three years has had a significant negative impact on conduct of the City's business, at least in the short term. This was due primarily to a loss of detailed knowledge of the many complex issues dealt with by a large city's multitude of departments and agencies. This knowledge can only be perfected by months or years of daily experience interpreting the Municipal Code, the policies and procedures of the various departments and agencies, and applying these to a wide range of issues. The Grand Jury in no way wishes to disparage the skill and dedication of the Deputy City Attorneys. However, our investigation revealed that the learning curve is steep, and while new hires were learning the ropes, business has suffered.

### ***FACTS/FINDINGS***

***Fact:*** All of the approximately 135 San Diego Deputy City Attorneys are in the Unclassified Civil Service.

***Finding #02:*** San Diego Deputy City Attorneys serve at the pleasure of the City Attorney and are subject to dismissal, with or without cause, provided only that notice is given.

***Finding #03:*** San Diego Deputy City Attorneys enjoy significantly less job security than their counterparts in the offices of the District Attorney and County Counsel.

***Fact:*** Since December 2004, a combined total of 124 Deputy City Attorneys have left the employ of the City of San Diego.

***Finding #04:*** The departure of so many experienced Deputy City Attorneys has had a negative effect on conduct of the city's business.

### ***RECOMMENDATIONS***

**The 2007/2008 San Diego County Grand Jury recommends that the Mayor and City Council of the City of San Diego:**

**08-123:** Explore moving Deputy City Attorneys who have completed an appropriate probationary period from the Unclassified to the Classified Civil Service, in

order to provide greater stability in the City Attorney's Office. If this is found to be feasible, amend the city charter as necessary.

### ***COMPLETE RECOMMENDATIONS***

**The 2007/2008 San Diego County Grand Jury recommends that the Mayor and City Council of the City of San Diego:**

- 08-122:** Draft an amendment to Article V, §40 of the San Diego City Charter, specifying more clearly the qualifications, duties and responsibilities of the City Attorney, and submit it to the electorate at an appropriate future date.
- 08-123:** Explore moving Deputy City Attorneys who have completed an appropriate probationary period from the Unclassified to the Classified Civil Service, in order to provide greater stability in the City Attorney's Office. If this is found to be feasible, amend the city charter as necessary.

### ***REQUIREMENTS AND INSTRUCTIONS***

The California Penal Code §933(c) requires any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the agency. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court); except that in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such comment shall be made *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

- (a) As to each grand jury finding, the responding person or entity shall indicate one of the following:
  - (1) The respondent agrees with the finding
  - (2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.
- (b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:
  - (1) The recommendation has been implemented, with a summary regarding the implemented action.



- (2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
  - (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.
  - (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.
- (c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 are required from the:

<u>Responding Agency</u>	<u>Recommendations</u>	<u>Date</u>
Mayor, City of San Diego	08-122, 08-123	9/2/08
City Council, City of San Diego	08-122, 08-123	9/2/08

*APPENDIX A***Excerpt from the San Diego City Charter, Article V****Section 40: City Attorney**

At the municipal primary and general election in 1977, a City Attorney shall be elected by the people for a term of seven (7) years. A City Attorney shall thereafter be elected for a term of four (4) years in the manner prescribed by Section 10 of this Charter.

Notwithstanding any other provision of this Charter and commencing with elections held in 1992, no person shall serve more than two (2) consecutive four-year terms as City Attorney. If for any reason a person serves a partial term as City Attorney in excess of two (2) years, that partial term shall be considered a full term for purposes of this term limit provision. Persons holding the office of City Attorney prior to the November 1992 election shall not have prior or current terms be counted for the purpose of applying this term limit provision to future elections.

The City Attorney shall be the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties, except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney. The attorney and his or her deputies shall devote their full time to the duties of the office and shall not engage in private legal practice during the term for which they are employed by the City, except to carry to a conclusion any matters for which they have been retained prior to taking office.

The City Attorney shall appoint such deputies, assistants, and employees to serve him or her, as may be provided by ordinance of the Council, but all appointments of subordinates other than deputies and assistants shall be subject to the Civil Service provisions of this Charter.

It shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, to perform all services incident to the legal department; to give advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department, but all such advice shall be in writing with the citation of authorities in support of the conclusions expressed in said written opinions; to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law; to prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned, and to endorse on each approval of the form or correctness thereof; to preserve in the City Attorney's office a docket of all cases in which the City is interested in any of the courts and keep a record of all proceedings of said cases; to preserve in the City Attorney's office copies of all written opinions he or she has furnished to the Council, Manager, Commission, or any officer. Such docket, copies and papers shall be the property of the City, and the City Attorney shall, on retiring from office, deliver the same, together with all books, accounts, vouchers, and necessary

information, to his or her successor in office.

The City Attorney shall have charge and custody of all legal papers, books, and dockets belonging to the City pertaining to his office, and, upon a receipt therefor, may demand and receive from any officer of the City any book, paper, documents, or evidence necessary to be used in any suit, or required for the purpose of the office.

The City Attorney shall apply, upon order of the Council, in the name of the City, to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the City or the abuse of corporate powers, or the execution or performance of any contract made in behalf of the City which may be in contravention of the law or ordinances governing it, or which was procured by fraud or corruption. The City Attorney shall apply, upon order of the Council, to a court of competent jurisdiction for a writ of mandamus to compel the performance of duties of any officer or commission which fails to perform any duty expressly enjoined by law or ordinance.

The City Attorney shall perform such other duties of a legal nature as the Council may by ordinance require or as are provided by the Constitution and general laws of the State. The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith. The Council shall provide sufficient funds in the annual appropriation ordinance for such purposes and shall charge such additional legal service against the appropriation of the respective Departments.

The salary of the City Attorney shall be fixed by the Council and set forth in the annual appropriation ordinance, provided that the salary of the City Attorney may not be decreased during a term of office, but in no event shall said salary be less than \$15,000.00 per year.

In the event of a vacancy occurring in the office of the City Attorney by reason of any cause, the Council shall have authority to fill such vacancy, which said authority shall be exercised within thirty (30) days after the vacancy occurs. Any person appointed to fill such vacancy shall hold office until the next regular municipal election, at which time a person shall be elected to serve the unexpired term. Said appointee shall remain in office until a successor is elected and qualified.

*(Amendment voted 04-20-1943; effective 05-04-1943.)*

*(Amendment voted 04-15-1947; effective 05-01-1947.)*

*(Amendment voted 11-04-1958; effective 02-19-1959.)*

*(Amendment voted 11-06-1962; effective 01-21-1963.)*

*(Amendment voted 11-04-1975; effective 12-01-1975.)*

*(Amendment voted 06-02-1992; effective 07-13-1992.)*

*(Amendment vote 11-02-2004; effective 04-01-2004)*

#### **Section 40.1: Concurrent Jurisdiction of City Attorney with District Attorney.**

000457

The City Attorney shall have concurrent jurisdiction with the District Attorney of the County of San Diego to prosecute persons charged with or guilty of the violation of the state laws occurring within the city limits of The City of San Diego for offenses constituting misdemeanors.

*(Addition voted 03-10-1953; effective 04-20-1953.)*

Source: San Diego City Clerk

**APPENDIX B****Excerpt from the Final Report of the 2007 San Diego Charter Review Committee****DUTIES OF ELECTED OFFICIALS**

10. Amend Section 40 (City Attorney) to create professional qualifications for this Office, define the civil client as the municipal corporation of the City of San Diego, clarify authority over the control and settlement of litigation, and establish a process allowing a City entity to retain outside legal counsel (at the entity's own expense) when the City Attorney's Office may not provide legal advice due to an ethical or financial conflict of interest.

One of the most serious problems with the Charter is the ambiguity of Section 40. The City has witnessed constant conflict over defining the duties of the City Attorney's Office. Is the City Attorney supposed to act as a policymaker or to serve as the City's attorney? There has been disagreement over whether this officer acts as attorney for the City as the municipal corporation, or for the City as the general public. The California State Bar's Rules of Professional Conduct provide clear rules for how an attorney is supposed to work when he or she represents an organization, and how to address such matters as Attorney-Client privilege and conflict of interest. The problem with the claim that the City Attorney is to represent the general public *is that the people do not speak with one voice. How does one know what the public wants in any given situation?* Consequently, an attorney who sees him or herself in this manner acts as both the attorney and the client. How would one know what the public wants, outside of one's own subjective understanding? The responsibility of the attorney to conform his or her actions with the client's right to make decisions is a bedrock principle of our legal system, and protects both the attorney and the client.

Proponents of the recommendation thought the Charter should be clear that the civil client is the municipal corporation, and should establish a process to designate which officers are to make client decisions in the control and settlement of litigation. Those in favor also thought the Charter should establish professional qualifications for election to the City Attorney's Office, and create a process to resolve whether outside legal counsel should be retained in the event that the City Attorney cannot represent a City entity due to a conflict of interest. Those who opposed this recommendation did so on the grounds that the City Attorney must be authorized to represent the people, or that the officer must be maintained in the watchdog role to protect the City's interests. Others who expressed some approval of the concept or the intent of the recommendation stated that this matter was better left to an appointed or an elected Charter commission.

The majority of the Committee noted that the recommendation does allow the City Attorney to litigate on behalf of the people both for criminal matters, as well as civil matters where the Mayor or Council have given their approval. This language is only controversial in that the present Charter language is so vague it allows action that might well violate the Rules of Professional Conduct. This Charter language requires the City Attorney to follow those rules. The Charter language recommended would preserve intact the City Attorney's ability to use an injunction or *writ of mandamus* to restrain or compel actions of City officials, and thus the officer's oversight role is

protected. The Subcommittee spent a great deal of time on the issue, and a number of the other Committee members who were not on this Subcommittee are already well versed in the rules of conduct governing all attorneys. Finally, City Attorneys are not guaranteed representation on appointed or elected Charter commissions: only the governing body or the voters can create a Charter commission. Ultimately, the Committee's majority felt that this issue was one of the most important addressed by the Committee, and that to fail to recommend an improvement to remove this dangerous ambiguity from the Charter would be a dereliction of duty.<sup>3</sup>

VOTE: SEPTEMBER 27, 2007; 9 AFFIRMATIVE, 5 NEGATIVE, 1 ABSENT. ROLL CALL: AFFIRMATIVE = BERSIN, CHANNICK, DAVIES, JONES, MCDADE, MILLIKEN, MUDD, NELSON, ROTH; NEGATIVE = CLEVES ANDERSON, GORDON, KWIATKOWSKI, SORENSEN, SPARROW; ABSENT = WILSON.

Source: Archives of the 2007 San Diego Charter Review Committee

*APPENDIX C***Excerpt from the San Diego City Charter, Article VIII****Section 117: Unclassified and Classified Services**

Employment in the City shall be divided into the Unclassified and Classified Service.

(a) The Unclassified Service shall include:

- (1) All elective City Officers
- (2) Members of all boards and commissions
- (3) All department heads and one principal assistant or deputy in each Department
- (4) One assistant to Mayor
- (5) City Manager, Assistant City Manager, and Assistants to the City Manager
- (6) City Clerk
- (7) Budget Officer
- (8) Purchasing Officer
- (9) Treasurer
- (10) All Assistant and Deputy City Attorneys
- (11) Industrial Coordinator
- (12) The Planning Director
- (13) A Confidential Secretary to the Mayor, City Council, City Manager, Police Chief, City Attorney
- (14) Officers and employees of San Diego Unified School District
- (15) Persons employed in positions for expert professional temporary service when such positions are exempted from the Classified Service for a specified period of temporary service by order of the Civil Service Commission

- (16) Interns including, but not limited to, Administrative Interns and legal Interns, temporarily employed in regularly established training programs as defined in the job specifications of the City
  - (17) Managerial employees having significant responsibilities for formulating or administering departmental policies and programs. Each such position shall be exempted from the Classified Service by ordinance, upon the initiation of the appropriate appointing authority and after receiving the advisory review and comment of the Civil Service Commission and the approval of the City Council.
- (b) The Classified Service shall include all positions not specifically included by this section in the Unclassified Service; provided, however, that the incumbents in the positions of the Planning Director and the Principal Assistant to the Planning Director on January 1, 1963 shall remain in the Classified Service until the respective positions are vacated by the incumbents.
- (c) The City may employ any independent contractor when the City Manager determines, subject to City Council approval, City services can be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service while maintaining service quality and protecting the public interest. The City Council shall by ordinance provide for appropriate policies and procedures to implement this subsection. Such ordinance shall include minimum contract standards and other measures to protect the quality and reliability of public services. A City department shall be provided with an opportunity and resources to develop efficiency and effectiveness improvements in their operations as part of the department's proposal. The City Manager shall establish the Managed Competition Independent Review Board to advise the City Manager whether a City department's proposal or an independent contractor's proposal will provide the services to the City most economically and efficiently while maintaining service quality and protecting the public interest. The City Manager will appoint seven (7) members to the Board. Four (4) shall be private citizens whose appointments shall be subject to City Council confirmation. Each shall have professional experience in one or more of the following areas: finance, law, public administration, business management or the service areas under consideration by the City Manager. Three (3) shall be City staff including a City Manager staff designee, a City Council staff designee and the City Auditor and Comptroller or staff designee. Such appointees shall not have any personal or financial interests which would create conflict of interests with the duties of a Board member. Members of the Board shall be prohibited from entering into a contract or accepting employment from an organization which secures a City contract through the managed competition process for the duration of the contract. The City Council shall have the authority to accept or reject in its entirety any proposed agreement with an independent contractor submitted by the City Manager upon recommendation of the Managed Competition Independent Review Board. The City Manager shall have the sole



responsibility for administering and monitoring any agreements with contractors. The City Manager shall be required to produce annual performance audits for contracted services, the cost of which must be accounted for and considered during the bidding process. In addition, the City Manager shall seek an independent audit every five (5) years to evaluate the City's experience and performance audits. During the period of time that the City operates under the Strong Mayor form of governance pursuant to Article XV, the reference herein to City Manager shall be deemed to refer to the Mayor.

*(Amendment voted 03-13-1945; effective 04-09-1945.)*  
*(Amendment voted 03-11-1947; effective 03-24-1947.)*  
*(Amendment voted 04-17-1951; effective 05-03-1951.)*  
*(Amendment voted 04-21-1953; effective 05-29-1953.)*  
*(Amendment voted 06-08-1954; effective 01-10-1955.)*  
*(Amendment voted 11-06-1956; effective 01-10-1957.)*  
*(Amendment voted 04-16-1957; effective 05-15-1957.)*  
*(Amendment voted 04-21-1959; effective 05-20-1959.)*  
*(Amendment voted 06-07-1960; effective 01-09-1961.)*  
*(Amendment voted 09-17-1963; effective 02-11-1964.)*  
*(Amendment voted 11-06-1979; effective 12-17-1979.)*  
*(Amendment voted 11-07-2006; effective 12-13-2006.)*

Source: San Diego City Clerk

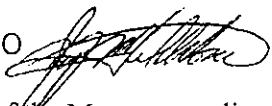


**OFFICE OF MAYOR JERRY SANDERS**  
**CITY OF SAN DIEGO**

**M E M O R A N D U M**

DATE: July 2, 2008

TO: City Attorney Michael Aguirre

FROM: Jay M. Goldstone, COO 

SUBJECT: Position of the Office of the Mayor regarding June 30, 2008 City Attorney Memorandum entitled: "Procedures Regarding Ballot Proposal by the Deputy City Attorneys Association"

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Representatives of the DCAA recently provided the Mayor's office with a DCAA-Proposed Charter Amendment which would provide Civil Service protection to most deputy city attorneys. In as much as the City has been participating in the Retirement related Charter Amendment meet and confer process with DCAA representatives and with other organizations, DCAA has been advised that input from your office is necessary before the DCAA Ballot Proposal would be addressed.

I am in receipt of your June 30, 2008 Memorandum where you address your perspectives regarding the DCAA Civil Service protection proposal. Although it is the Mayor's responsibility to conduct the meet and confer process, by memorandum dated January 28, 2008, we acknowledged your significant interest in working condition matters affecting your deputies. Similarly, I fully appreciate the significant interaction of the DCAA Civil Service protection proposal and the internal workings of your department. Therefore, under these specific circumstances, we agree to your June 30, 2008 request to take the lead regarding any mandated negotiations arising from the DCAA Ballot Proposal. As always, we will, provide assistance, if needed.

I am not responding to the remaining various points of law addressed in your Memorandum.

cc: Deputy City Attorneys Association  
Scott Chadwick, Labor Relations Director

Office of  
The City Attorney  
City of San Diego

MEMORANDUM  
MS 59

(619) 236-6220

**DATE:** June 30, 2008  
**TO:** Council President Scott Peters  
**FROM:** City Attorney  
**SUBJECT:** Procedures Regarding Ballot Proposal by the Deputy City Attorneys Association

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On June 25, 2008, the Rules Committee agenda included ballot proposals submitted by the public for placement on the November 4, 2008 election. One of the proposals was from the Deputy City Attorneys Association of San Diego [DCAA] to amend the Charter to provide Deputy City Attorneys with civil service protection. The item was called at the end of the meeting and just before the Committee was about to lose a quorum. Although there were public speakers on the proposal, the item was not reviewed by the Rules Committee in accordance with Council Policy 000-21 and no vote was taken. Instead, the matter was referred by the Chair to the City Attorney to meet and confer with the DCAA on the proposal.

We were informed on June 27, 2008, that because the matter was not reviewed by the Rules Committee, the item would move forward for Council consideration on July 15, 2008. This process is contrary to the rules outlined in Council Policy 000-21 for ballot measures submitted by the public. In those cases, the Rules Committee may approve or reject proposals submitted for review. Only those proposals approved or forwarded to the full Council by the Committee will be brought to the City Council for action. Accordingly, the better course of action would be to calendar the proposal for the next Rules Committee meeting on July 16, 2008, or call a special meeting during the week of July 7.

We recognize that Council Policy 000-21 also provides that: "Notwithstanding the procedures outlined in Sections I [proposals submitted by the public] and II, the City Council may at any time under the Rules of the Council adopt ballot propositions to be placed before the electorate." However, there are other considerations raised by the DCAA proposal because it implicates the meet and confer process.

Our position is that the DCAA proposal cannot come before the Council at all, because per Council Policy 300-06, California Government Code section 3505, and *Seal Beach Police Officers Association v. City of Seal Beach*, 36 Cal.3d 591 (1984), both the substance and language of the proposal must be negotiated with the City Attorney. As with any other labor

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negotiation, only if the parties reach an agreement, would the Council be asked to ratify the agreement. If the agreement was not ratified, that would end the matter.

Because the DCAA proposal appears to be a non-economic issue, if there is impasse, under Council Policy 300-06 as interpreted by the City Attorney, it is the City Attorney that makes the final decision as to whether to impose his last, best, and final offer for one more year. In that situation, the status quo may be continued and the DCAA proposal would not be a matter for Council consideration.

At this point, we believe the best course of action is to schedule the proposal for a Rules Committee meeting, hear from speakers, and vote whether to move it on to Council. After the matter is considered by the Rules Committee, we will meet and confer with the DCAA. If there is a mutual agreement between the negotiating parties, it will be brought to the Council to ratify. If not, the City Attorney may impose his last, best, and final offer for one more year.

MICHAEL J. AGUIRRE, City Attorney

By



Alan S. Hersh  
Deputy City Attorney

MJA

000467

# REQUEST FOR COUNCIL ACTION

CITY OF SAN DIEGO

1. CERTIFICATE NUMBER  
(FOR AUDITOR'S USE C)332  
07/15TO:  
CITY ATTORNEY2. FROM (ORIGINATING DEPARTMENT):  
Council President Peters3. DATE:  
6/26/2008

4. SUBJECT:  
Submitting to the voters a ballot proposition amending the City Charter to Provide Deputy City Attorneys with Civil Service Protection

5. PRIMARY CONTACT (NAME, PHONE & MAIL STA.)  
Elizabeth Kinsley, x66611 MS 10A6. SECONDARY CONTACT (NAME, PHONE & MAIL STA.)  
Christina Cameron, X66611 MS 10A7. CHECK BOX IF REPORT TO  
COUNCIL IS ATTACHED ☐

## 8. COMPLETE FOR ACCOUNTING PURPOSES

FUND				
DEPT.				
ORGANIZATION				
OBJECT ACCOUNT				
JOB ORDER				
C.I.P. NUMBER				
AMOUNT				

9. ADDITIONAL INFORMATION / ESTIMATED COST:

## 10. ROUTING AND APPROVALS

ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED	ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED
1	ORIGINATING DEPARTMENT	<i>Elizabeth Kinsley</i>	7/2/08	8	DEPUTY CHIEF		
2				9	COO		
3				10	CITY ATTORNEY		
4	LIAISON OFFICE			11	ORIGINATING DEPARTMENT	<i>Elizabeth Kinsley</i>	7/2/08
5					DOCKET COORD: _____	COUNCIL LIAISON: _____	
6					COUNCIL PRESIDENT <input type="checkbox"/> SPOB <input type="checkbox"/> CONSENT <input checked="" type="checkbox"/> ADOPTION		
7					<i>MS</i> <input type="checkbox"/> REFER TO: _____	COUNCIL DATE: 7/15/08	

11. PREPARATION OF:

☐ RESOLUTION(S)☒ ORDINANCE(S)☐ AGREEMENT(S)☐ DEED(S)

1. Submitting to the qualified voters of the City of San Diego at the Municipal Election consolidated with the Statewide Election to be held on November 4, 2008, one proposition amending the City Charter by amending Article IV, section 40 and amending Article VIII, section 117, relating to requirements that all Deputy City Attorneys appointed on or after July 1, 2010, to be members of the City's classified service. 2. Directing the City Attorney to prepare a ballot title and summary. 3. Directing the City Attorney to prepare an impartial analysis. 4. Directing the Mayor's Office to prepare a fiscal analysis. 5. Assigning authorship of the ballot argument.

11A. STAFF RECOMMENDATIONS:

12. SPECIAL CONDITIONS:

COUNCIL DISTRICT(S): N/A

COMMUNITY AREA(S): N/A

ENVIRONMENTAL IMPACT: This activity is not a "project" and therefore exempt from CEQA pursuant to State CEQA guidelines Sect. 15060 (C)(3).

HOUSING IMPACT: N/A

OTHER ISSUES:



PAUL, PLEVIN,  
SULLIVAN &  
CONNAUGHTON LLP

401 B STREET, TENTH FLOOR, SAN DIEGO, CA 92101  
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J. ROD BETTS  
PARTNER

(619) 243-1560 rbetts@paulplevin.com

#332  
7/15/2008

VIA ELECTRONIC AND U.S. MAIL

July 11, 2008

Andrew Jones  
President  
Deputy City Attorneys Association of San Diego  
615 "C" Street, Box 149  
San Diego, CA 92101

RECEIVED  
08 JUL 14 AM 10:57  
CITY CLERKS OFFICE  
SAN DIEGO, CA

Re: DCAA's Unilateral Declaration of Impasse Regarding Ballot Proposal

Dear Mr. Jones:

We are in receipt of the letter you e-mailed to me last evening declaring impasse regarding the ballot language for DCAA's purported November 2008 ballot proposal to move Deputy City Attorneys from the City's Unclassified Service to the Classified Civil Service.

DCAA's unilateral declaration of impasse, when the parties have yet to commence good faith meet and confer as required by California Government Code section 3505, is a blatant act of bad faith bargaining by DCAA. As you know, California Government Code section 3505 requires that a public agency and its employee organizations are required to meet and confer "in good faith", which means that the parties:

Shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions and proposals, and to endeavor to reach agreement on matters within the scope of representation.

In addition, the process must include "adequate time for the resolution of impasses."

Here, the chronology of events clearly demonstrates that DCAA has drastically "jumped the gun" in declaring impasse before the parties have even been able to hold a single meet and confer session. The relevant chronology is as follows:

Andrew Jones  
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Date	Event
June 20, 2008	DCAA notifies City that it is presenting a ballot proposal for negotiations regarding conversion of Deputy City Attorneys to Civil Service.
June 23, 2008	City's Director of Labor Relations advises DCAA that the City cannot address the proposal until (1) assessing the legality of the DCAA position from a procedural standpoint; (2) receiving input from the City Attorney as to his position regarding the DCAA proposal; and (3) receiving input from the Office of the Mayor regarding its position on the DCAA proposal.
June 24, 2008	The parties meet and DCAA agrees to defer any further request for negotiation of the ballot proposal until after the City Council Rules Committee meeting on June 25.
June 25, 2008	City Council Rules Committee meets, but takes no action on the DCAA proposal.
June 27, 2008	DCAA advises Labor Relations Director that ballot proposal will be put on City Council agenda on July 14, and requests to meet and confer with Labor Relations office over the ballot proposal. The City's Labor Relations Director responds on the same date repeating that the City's position is stated in his June 23 communication.
June 30, 2008	The City Attorney's office submits legal memorandum to the City Council explaining that the DCAA proposal cannot yet come before Council because California Government Code section 3505, Council Policy 300-06 and <i>Seal Beach Police Officers Association v. City of Seal Beach</i> , 36 Cal.3d 591 (1984) require that both the substance and language of the proposal must be negotiated before it is placed on the ballot. The City Attorney pledges that "we will meet and confer with the DCAA."
July 1, 2008	Andrew Jones states that DCAA will not negotiate with the City Attorney on the ballot proposal, but rather only with the Mayor's representatives.
July 2, 2008	The Mayor's office sends letter to DCAA indicating that the City Attorney should be the lead negotiator in the negotiations with DCAA on the ballot measure.

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Date	Event
July 3, 2008	DCAA e-mails City Attorney requesting to meet and confer on the ballot measure and proposing various dates between July 7 and July 14.
July 4, 2008	Independence Day holiday and three-day weekend.
July 8, 2008	City Attorney sends memorandum to DCAA responding to demand to meet and confer. The memorandum requests 12 items of information from DCAA, and states that the City Attorney is researching numerous complex issues relating to DCAA's ballot proposal, but will "make proposals through the negotiation process."
July 9, 2008	The City Attorney's lead negotiator e-mails DCAA proposing to commence meet and confer on the ballot proposal on July 16 or July 18.
July 10, 2008	DCAA declares impasse in the meet and confer process over the ballot language, even though no meeting has yet occurred.

The foregoing chronology makes it abundantly clear that DCAA has refused to meet and confer in good faith with the City as required by Government Code section 3505. For example:

- DCAA has declared impasse before coming to a single meet and confer session with the City. [An impasse is the "point at which the parties have exhausted the prospects of concluding an agreement and further discussion would be fruitless." *Modesto City Schools* (1983) PERB Decision No. 291.]
- DCAA has failed to continue the meet and confer process for a "reasonable period of time" as required by the statute.
- DCAA has refused to respond to the City's request for information, even though during the meet and confer process over the labor contract, DCAA made numerous requests for information and demanded quick responses by the City.



**PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP**

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Page Four


- In regard to the labor contract negotiations, the meet and confer process consisted of 18 meetings between January and May 2008, followed by an impasse hearing.

Thus, there is absolutely no question that DCAA has failed to meet and confer in good faith as required under the MMBA and Council Policy 300-06 prior to declaring impasse in regard to the ballot proposal negotiations.

The City Attorney is still prepared to meet and confer with DCAA regarding its ballot proposal next week on the dates and times set forth in my June 9 e-mail to you. We urge you to reconsider your ill-advised declaration of impasse, and to notify me of your intention to proceed with the meet and confer process on those dates. Please be advised that if DCAA fails to do so, the City Attorney will take whatever action is necessary to enforce the City's rights, including, but not limited to, the filing of an unfair practice charge with the Public Employment Relations Board ("PERB").

Very truly yours,

**Paul, Plevin, Sullivan  
& Connaughton LLP**

By:   
J. Rod Betts

JRB/jd

cc: City Council Members  
Jerry Sanders, Mayor  
Jay Goldstone, Chief Operating Officer  
Mike Aguirre, Esq., City Attorney  
Scott Chadwick, Labor Relations Director  
Andrea Tevlin, Independent Budget Analyst  
Elizabeth Maland, City Clerk